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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LEE MARTINEZ, Defendant and Appellant.	C043341 (Super. Ct. No. SF084548A)

APPEAL from a judgment of the Superior Court of San Joaquin County, William J. Murray, Jr., J. Affirmed.

Geri Lyn Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Mary Jo Graves, Assistant Attorneys General, Stan Cross and Janet E. Neeley, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, IV, V, VI, and VIII, of the DISCUSSION and the Concurring Opinions.

PLEASE SEE ATTACHED CONCURRING OPINIONS

A jury convicted defendant Kenneth Lee Martinez of torture (count 1; Pen. Code, § 206; undesignated section references are to the Penal Code); five counts of assault by means of force likely to produce great bodily injury or with a deadly weapon (counts 2-6; § 245, subd. (a)(1)); corporal injury to a cohabitant (count 7; § 273.5); forcible rape (count 8; § 261, subd. (a)(2)); forcible oral copulation (count 9; § 288a, subd. (c)); criminal threats (count 11; § 422); dissuading a witness by force or threat (count 12; § 136.1, subd. (c)(1)); and false imprisonment by violence (count 13; § 236). The jury also found as to counts 7 through 9 that defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)), and as to counts 8 and 9 that defendant inflicted torture and great bodily injury upon the victim (§ 667.61, subds. (a)/(d)(3), (b)/(e)(3)), personally used a deadly weapon, and personally inflicted great bodily injury (§ 667.61, subds. (b)/(e)(4), (a)/(e)(3)).[1]

The trial court sentenced defendant to a total term of 54 years, eight months to life in state prison. The court imposed 25 years to life on count 8, the principal term, pursuant to the one strike law (§ 667.61), and imposed the same term on the

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[1] Defendant was acquitted on count 10, which charged a second act of forcible oral copulation. The prosecution dismissed counts 14 through 16, charging assault with intent to commit rape (§ 220), in the interests of justice.

enhancements to count 8 but stayed that term under section 654. The court then imposed a consecutive sentence of 25 years to life on count 9, finding that the offenses charged in counts 8 and 9 occurred on separate occasions. The court further imposed consecutive sentences of one year (one-third the middle term) on count 2, three years (the middle term) on count 12, and eight months (one-third the middle term) on count 13. Finally, the court imposed sentences on the remaining counts and enhancements (count 1, life; counts 3-6, four years (the upper term); count 7, four years (the upper term); the enhancement to count 7, five years (the upper term); count 11, three years (the upper term)), but stayed them under section 654.

Defendant contends: (1) Counts 2 through 13 are lesser included offenses of count 1 (torture) and therefore must be stricken. (2) Alternatively, if torture is not a continuous course of conduct offense, the trial court erred by failing to give the jury a unanimity instruction as to both torture and the other substantive offenses. (3) The statute defining torture (§ 206) was "[s]uperseded" (i.e., preempted) by the United States's ratification of an international convention on torture. (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (Convention Against Torture).) (4) The trial court violated due process by instructing the jury with CALJIC No. 2.50.02. (5) Section 206 is void for vagueness, facially and as applied. (6) The trial court erred by imposing consecutive sentences on

counts 8 and 9 under section 667.61 because the offenses were committed on a single occasion. (7) The trial court's admission of the victim's out-of-court statements violated *Crawford v. Washington* (2004) 541 U.S. __ [158 L.Ed.2d 177] (*Crawford*). (8) The trial court's sentencing violated *Blakely v. Washington* (2004) 542 U.S. __ [159 L.Ed.2d 403] (*Blakely*).

In the published portion of the opinion, we conclude (1) counts 2 through 13 are not lesser included offenses of count 1 (torture); (2) the statute defining torture (§ 206) is not preempted by the Convention Against Torture or by federal statutes implementing the same; and (3) the trial court's admission of the victim's out-of-court statements did not violate *Crawford, supra,* 541 U.S. __ [158 L.Ed.2d 177].

In the unpublished portion of the opinion, we reject defendant's remaining contentions of error.

We shall therefore affirm the judgment.

FACTS

On June 8, 2002,[2] R., the victim, and defendant, her live-in boyfriend, got into a physical fight at his workplace. Both were arrested and jailed. R. bailed out that day, but defendant spent four days in jail.

When released from jail, defendant went back to the home of R. and her 12-year-old son in Stockton. However, on June 14,

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[2] All further dates are in 2002 unless otherwise stated.

defendant learned that the fight with R. at his workplace had cost him his job. Instead of going home, he went to a friend's house in Thornton. Early the next day, defendant called R. to ask her to come pick him up.

After R. got there, defendant burst out of a parked van, grabbed her by the hair, and dragged her into the van. Keeping her trapped inside, he accused her of making him lose his job, vandalizing his vehicle, and stealing his briefcase. He struck her with a chain on the head, back, and shoulders and kicked her repeatedly with steel-toed boots.

Later in the day, defendant drove with R. back to her house. When he fell asleep, she left to look for her missing wallet. She did not report defendant to the police at that point because she feared for the safety of her son if she did so, and because the police had sided with defendant over her in the June 8 incident. Furthermore, defendant had disconnected the telephones in the house.

From Sunday, June 16, to Tuesday, June 18, defendant held R. hostage and beat her repeatedly, at different times using his fists, his steel-toed boots, a star-shaped tire iron, a flashlight, and a metal nail puller. He also raped her and forced her to orally copulate him three or four times.[3]

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[3] R.'s recollections about these incidents were not precise. She told one officer she was forced to have sex with defendant three to four times. She told another she had consensual sex with defendant once during this period, but the remaining times were

Throughout this period, he continued to berate her about his lost job; he also threatened to kill her and her family if she told anyone about what he was doing to her.

On June 17, R. went across the street to her neighbor M. G.'s house to get hamburger meat. M. G. noticed R.'s face was bruised and asked her to stay, but R. said she could not because defendant would get mad at her. M. G. urged R. to call the police, but R. said she did not want to get M. G. involved.

On the evening of June 18, defendant twice poured rubbing alcohol over R. while they were in the bathroom, then set pieces of toilet paper alight and threw them at her. He told her he wanted her to die and to see her burn in hell.

Failing to set R. on fire the first time, defendant poured a bottle of hydrogen peroxide over her and told her to shower. She could not undress or operate the shower because her hands were broken. Defendant forced her in and poured shampoo on her head. When he put her hands on her head, she screamed in extreme pain. He ordered her to dress and put on makeup, but she could not. He kept on hitting and kicking her.

Defendant then repeated the process, again trying and failing to set R. on fire, then forcing her into the shower. He

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nonconsensual. She also remembered two incidents of forced oral copulation. (As noted, the jury convicted defendant of one such act but acquitted him of another.)

A rape examination done shortly after R.'s escape from captivity confirmed that she had had sex after Saturday, June 15.

pulled her up by the arms, which had been broken in the course of his assaults. He again demanded sex. R. felt sure she would die if she did not escape.

When defendant left the bathroom for a moment, R. ran naked out of the bathroom and across the street to M. G.'s house, where she was able to call 911.

The emergency room doctor observed that R. was bruised all over. She had significant swelling and broken skin over her right temple, deeply bruised forearms, and a bony deformity in one arm. X-rays revealed both forearms, a rib, and a leg bone were broken; the right forearm had multiple fractures. R.'s lesions looked like the result of being beaten with a crowbar or tire iron, as she told the doctor she was.

The prosecution also introduced the testimony of K. M. pursuant to Evidence Code section 1109. K. M., a former girlfriend of defendant who had had a child with him, testified that on May 2, 1999, defendant unexpectedly came to her apartment. During the ensuing conversation, he got mad at her, struck her in the face, and damaged the apartment. When she tried to leave, he grabbed her arm hard enough to cause a bruise.

At trial, R. repudiated her prior accounts inculpating defendant, including her stories to the police and her preliminary hearing testimony. She claimed she assaulted defendant repeatedly during the episode, while defendant hit and kicked her only once near the end of the episode and only in

self-defense. According to R., she was jealous about defendant's imagined infidelity and was drinking heavily throughout the episode. She suffered almost all her injuries either from falling off a gate when she jumped a fence at the Thornton residence or from falling off a ladder when trying to kick defendant.

In addition to presenting R.'s preliminary hearing testimony and the stories she had previously told police and others, the prosecution impeached R.'s trial testimony by introducing the tape and transcript of her conversation with defendant and her son-in-law during a jail visit after the preliminary hearing. In that conversation, defendant repeatedly apologized for what he had done and told R. he loved and needed her, she repeatedly told him she loved and needed him, and they talked about how to get this incident behind them and reunite. Her son-in-law said the two of them would have to "get a story going and . . . make sure it sounds right."

Defendant did not testify.

DISCUSSION

I

Defendant contends that counts 2 through 13 were lesser included offenses of torture (count 1) because the substantive offenses charged in counts 2 through 13 were "[t]he underlying

acts which constituted the torture." Therefore, defendant says, his convictions on those counts must be stricken.[4]

"[M]ultiple convictions may *not* be based on necessarily included offenses. [Citations.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)

An offense is a lesser included offense to a charged offense if the former is necessarily included in the latter. There are two tests to determine whether this is so: (1) if all of the elements of the lesser offense are included in the elements of the greater offense, or (2) if the allegations of the pleading describe the charged offense so that it necessarily includes all the elements of the lesser offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

A. *The Elements-of-the-Offense Test*

Section 206 defines the crime of torture as follows: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain."

The offenses charged in counts 2 through 9 and 11 through 13 consisted of assault by means of force likely to produce great bodily injury or with a deadly weapon (§ 245, subd.

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[4] As previously mentioned, defendant was acquitted on count 10 (forcible oral copulation).

(a)(1); counts 2-6); corporal injury to a cohabitant (§ 273.5; count 7); forcible rape (§ 261, subd. (a)(2); count 8); forcible oral copulation (§ 288a, subd. (c); count 9); criminal threats (§ 422; count 11); dissuading a witness by force or threat (§ 136.1, subd. (c)(1); count 12); and false imprisonment by violence (§ 236; count 13). (See Amended Information at Appendix, *post*.)

We shall begin with counts 7 through 13. None of these is a necessarily included offense of torture as defined in section 206 because all have elements not necessarily included in torture. Torture does not require that the victim be a cohabitant, as does the crime charged in count 7. It does not require sexual conduct, as do the crimes charged in counts 8 and 9. It does not require the making of threats, as does the crime charged in count 11. And it does not require false imprisonment, as does the crime charged in count 13.

This leaves counts 2 through 6.

Each of these counts was pled in the following manner, with a different deadly weapon named in each count:

"On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon JANE DOE, with a deadly weapon, to wit, [], or by means of force likely to produce great bodily injury." (See Appendix, *post*.)

This pleading tracks the language of section 245, subdivision (a)(1) which provides in pertinent part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury shall be punished . . . ."

As is readily apparent, the statute describes two different ways of committing a prohibited assault: (1) by use of a deadly weapon or instrument other than a firearm *or* (2) by means of force likely to produce great bodily injury.

This dichotomy in the statute tenders an interesting puzzle in this case, because while an assault by means of force likely to produce great bodily injury is arguably an included offense within the crime of torture, assault with a deadly weapon is not, as we shall explain in a moment.

However, we think this riddle must be solved by focusing on the rule the defendant seeks to apply here: that a defendant may not be *convicted* of an offense that is a lesser included offense to torture.

In this case, the record makes clear that defendant was *convicted* upon a theory that he committed an assault with a deadly weapon, not assault by means of force likely to produce great bodily injury. (See *People v. McGee* (1993) 15 Cal.App.4th 107.) This is so for the following reasons:

1. With respect to counts 2 through 6, the trial court instructed, "The defendant is accused in Count 2 through 6 of having violated Section 245(a)(1) of the Penal Code, assault

with a deadly weapon, a felony. [¶] A deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury."

The trial court did *not* instruct the jury that it could find defendant committed the offense charged in counts 2 through 6 by finding he committed an assault by means of force likely to produce great bodily injury.

2. In their closing arguments, both prosecutor and defense counsel described the offense charged in counts 2 through 6 as "assault with a deadly weapon." Thus, for example, the prosecutor argued, "Now there's several counts of what's called assault with a deadly weapon. And these were committed with a chain, this flashlight, the crowbar, tire iron." The prosecutor did *not* argue the offense at issue in counts 2 through 6 could be committed by means of force likely to produce great bodily injury. By limiting his argument in this manner (to an assault with a deadly weapon), the prosecutor elected that theory of prosecution.

3. Finally, and most conclusively, each verdict on counts 2 through 6 was in the following form (with a different deadly weapon specified in each count):

"We, the Jury, in the above entitled cause, find the defendant, KENNETH MARTINEZ, guilty of a violation of Section 245(a)(1) of the Penal Code of the State of California, to-wit: ASSAULT WITH A DEADLY WEAPON, to wit: [], a felony, as charged and set forth in Count [] of the Information on file herein."

It is therefore clear that defendant was convicted of violation of section 245, subdivision (a)(1) upon the theory that he used a deadly weapon. (See *People v. McGee, supra,* 15 Cal.App.4th 107, 115.) Because defendant was convicted upon this theory, his violation of section 245, subdivision (a)(1) was not a lesser included offense of torture, because his violation of section 245, subdivision (a)(1) required that he use a deadly weapon, whereas the crime of torture does not require the use of any weapon. (See *People v. Arnett* (1899) 126 Cal. 680, 681.)

We recognize that in *In re Mosley* (1970) 1 Cal.3d 913, our Supreme Court said, "As indicated above, the information charged petitioner with assault with a deadly weapon in violation of section 245 of the Penal Code. The court found him guilty of assault by any means of force likely to produce great bodily injury in violation of the same section. The judgment, after setting forth this finding, states that the offense of which petitioner was found guilty is 'a lesser offense than that charged in the information but necessarily included therein.' This is not so. Section 245 . . . defines only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument or by means of force likely to produce great bodily injury. . . .' The offense of assault by means of force likely to produce great bodily injury is not an offense separate from--and certainly not an offense lesser than and included within--the offense of assault with a deadly weapon." (*Id.* at p. 919, fn. 5.)

However, the court continued, "This is not to say, of course, that a judgment may not properly specify which of the two categories of conduct prohibited by section 245 (i.e., assault (1) with a deadly weapon or instrument, or (2) by means of force likely to produce great bodily injury) was involved in the particular case. We believe that such a finding should be made for the benefit of probation and correction officials who may . . . attach significance thereto." (*In re Mosley, supra,* 1 Cal.3d 913, 919, fn. 5.) Another salutary purpose of such a finding (which was made in this case) is to allow a court to determine whether the violation of section 245, of which defendant was convicted, was a lesser included offense within some other, greater offense of which defendant was convicted. That is what we have done here.

Applying the elements test of lesser included offenses, no offense in counts 2 through 9 and 11 through 13 was a lesser offense of torture.

B. *The Pleadings Test*

Even assuming the pleadings test of lesser included offenses applies in this context (but see *People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-170), these offenses were also not necessarily included in torture as pled here. The amended information on which the case went to trial alleged as to count 1: "On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of TORTURE, in violation of Section 206 of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid did willfully and unlawfully and with

the intent to cause cruel and [*sic*] extreme pain and suffering for the purpose of revenge, extortion, persuasion and [*sic*] for a [*sic*] sadistic purpose, inflict great bodily injury, as defined in Penal Code Section 12022.7 upon JANE DOE." Aside from its erroneous substitutions of "and" for "or," the pleading did not change the definition of the offense. Thus it did not incorporate the otherwise extraneous elements of any offense charged in the remaining counts.

Nor did the manner of pleading the remaining counts change the picture. Each assault count alleged the use of a different weapon or instrument: a chain (count 2), a flashlight (count 3), a crowbar (count 4), a tire iron (count 5), and fire (count 6). None of these specific means was alleged in count 1. Nor, as already noted, were any of the specific elements of the remaining counts. (See Appendix, *post*.)

Defendant asserts that if the offense of torture in this case was a continuous course of conduct, the "underlying acts which constituted the torture" are necessarily included offenses of torture. He cites no authority for this proposition, however--understandably, as it is a non sequitur. Whether acts comprise part of a continuous course of conduct has nothing to do with whether they are *necessarily* included, either by statutory definition or by pleading, within the principal offense. (Cf. *People v. Lopez, supra,* 19 Cal.4th 282, 288-289.)

Contrary to defendant's contention, the offenses of which he was convicted on counts 1 through 9 and 10 through 13 were not lesser included offenses of torture.

II

In the alternative, defendant contends that the trial court should have given the jury a unanimity instruction sua sponte so that the jurors all agreed on which act or acts constituted the crime of torture. He concedes, however, that such instruction was required only if the crime of torture was not a continuous course of conduct offense. That concession is fatal to his argument.

The "continuous course of conduct" exception to the unanimity requirement "arises in two contexts. [Citations.] 'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' (*People v. Thompson* [1984] 160 Cal.App.3d [220,] 224.)" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299 (*Jenkins*).) Thus, the exception may apply either to an offense which "'may be continuous in nature'" or to one where the acts are "'so closely connected that they form one transaction'" and "'are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto.'" (*Id.* at p. 299.)

In *Jenkins, supra,* 29 Cal.App.4th 287, the court found that the defendant's torture of his victim, which consisted of multiple beatings and other abusive acts using a variety of weapons and instruments within a specified period of time, closely related in time and place, constituted a continuous

course of conduct such that a unanimity instruction was not required. (*Id.* at p. 300.) The court based its holding not only on the specific acts committed, but also on "the nature of torture." (*Ibid.*)

As defendant admits, the facts of *Jenkins, supra,* 29 Cal.App.4th 287, are very similar to those of this case. Furthermore, like the court in *Jenkins*, *supra*, 29 Cal.App.4th 287, we think torture as defined in section 206 is inherently a crime "'which may be continuous in nature.'" (*Id.* at p. 299.) Although in theory a single act might be enough to satisfy the statute, it is far more common for someone acting "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose" (§ 206) to carry out that intent by a series of acts within a limited time and space.

Defendant also contends the trial court erred in failing to give a unanimity instruction with respect to counts other than the torture count, because the victim described various acts constituting each offense. However, the overwhelming evidence of guilt on these counts came from a single witness: the victim. Moreover, the defense as to all counts was the same: the victim entirely recanted and testified none of the events happened. In these circumstances, the jury would either believe the victim's recantation or not. We therefore conclude beyond a reasonable doubt that the verdicts of the jury would have been the same even if a unanimity instruction had been given, so that the failure to give a unanimity instruction, with respect to the

counts other than torture, was harmless. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186-188; *People v. Deletto* (1983) 147 Cal.App.3d 458, 473.)

III

Defendant further attacks his conviction for torture by contending that the United States's ratification of the Convention Against Torture has preempted section 206.[5] Defendant is wrong.

Article 1 of the Convention Against Torture defines torture "[f]or the purposes of this Convention" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*." (Italics added.) Article 1 further provides: "This article is without prejudice to any international instrument or national legislation which does or

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[5] The heading of this argument alleges section 206 was "[s]uperceded" by the Convention Against Torture. However, defendant's argument makes clear he is talking about preemption.

may contain provisions of wider application." (Convention Against Torture, *supra*, art. 1, §§ 1-2.)

Article 2 requires each state party to the Convention to take effective measures to prevent torture within its jurisdiction and bars the use of "exceptional circumstances" or superior orders as justifications for torture. Article 3 bars state parties from extraditing persons to other states where substantial grounds exist to believe they would be in danger of torture. Article 4 requires each state party to ensure that all acts of torture are offenses under its criminal law. Article 5 requires each state party to establish jurisdiction over all such offenses in all territories it controls or on board its ships and aircraft. Article 6 requires any state party in whose territory a suspected torturer is present to take him into custody. Article 7 requires such state party to submit the detained person to its competent authorities for prosecution. Article 8 establishes the Convention as a legal basis for extradition in cases of torture where state parties do not have treaties of extradition between themselves. Article 9 requires state parties to assist each other as far as possible in connection with civil proceedings brought pursuant to article 4. Article 10 requires state parties to educate all persons who may be involved in the custody, interrogation, or treatment of any person regarding the prohibition against torture. Article 11 requires state parties to review their methods of custody and treatment of detained persons with a view to preventing torture. Article 12 requires state parties to ensure that their competent

authorities investigate all suspected cases of torture promptly and impartially. Article 13 requires state parties to guarantee the right of persons claiming they have been tortured to a prompt and impartial investigation and to protection against retaliation for their complaints. Article 14 requires state parties to provide in their legal systems for full redress and compensation for torture victims. Article 15 bars the use of evidence obtained by torture in any proceeding. Article 16 requires state parties to undertake to prevent within their jurisdictions acts of cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in article 1, "when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," and further provides that the Convention's provisions are without prejudice to the provisions of any other national law or international instrument relating to this topic. (Convention Against Torture, *supra*, arts. 2-16.)[6]

The United States Senate ratified the Convention Against Torture with a number of reservations, interpretive understandings, and declarations, including the following: "The Senate's advice and consent is subject to the following declarations: (1) *That the United States declares that the*

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[6] The remaining provisions of the Convention Against Torture (arts. 17-33), which deal with the international implementation of the Convention, are not material to our discussion.

provisions of articles 1 through 16 of the Convention are not self-executing." (Reservations, Understandings, and Declarations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36198 (1990).)

"Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. [Citation.] In determining whether federal law preempts state law, a court's task is to discern congressional intent. [Citation.] Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. [Citation.] Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law [citation]; (ii) when compliance with both federal and state regulations is an impossibility [citation]; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) Defendant fails to show any basis for finding preemption under any of these tests.

It is untenable that Congress intended the Convention itself to preempt state laws against torture. The Senate's ratification of the Convention was expressly subject to a provision declaring articles 1 through 16 as "not self-

executing." Congress could not have intended state anti-torture laws to be preempted by an agreement that contained no sanctions against torture.

Defendant has cited no law enacted by the Congress that executes the Convention. However, our independent research has discovered chapter 113C of title 18 of the United States Code, (§ 2340 et seq.), entitled "Torture,"[7] which was enacted to implement the Convention Against Torture. (See Senate Report No. 103-107, 1994 U.S. Code Cong. & Admin. News, at p. 366.)

Section 2340 of title 18 provides in pertinent part: "As used in this chapter--[¶] (1) 'torture' means an act committed by a person *acting under the color of law* specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." (Italics added.)

Section 2340A of title 18 provides in pertinent part: "(a) Offense.--Whoever *outside the United States* commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." (Italics added.)

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[7] Further references to title 18 are to the United States Code.

Finally, section 2340B of title 18 provides: "*Nothing in this chapter shall be construed as precluding the application of State* or local *laws on the same subject*, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding." (Italics added.)

Congress could not have intended chapter 113C of title 18 to preempt state anti-torture laws, because (1) the chapter outlaws only torture undertaken under the color of law; Congress could not have intended other torture, punished by state laws, to go unpunished; (2) the chapter outlaws torture committed outside the United States; Congress could not have intended torture committed inside the United States to go unpunished; and (3) Congress has unambiguously declared that "[n]othing in this chapter shall be construed as precluding the application of State . . . laws on the same subject . . . ."

Aside from the Convention itself, defendant relies solely on *People v. Kruger* (1975) 48 Cal.App.3d Supp. 15, which held that the United States's ratification of a convention dealing with tuna fishing had preempted California regulation of yellowfin tuna fisheries. (*Id.* at pp. 17-20.) This decision is inapposite. Congress, after ratifying the convention, had enacted legislation and implementing regulations in accordance with the convention. These legislative actions fully occupied the field. And the field itself (fishing in international waters) was an area of law in which Congress had paramount

authority. (*Id.* at p. 20.) None of these factors applies to section 206.

Defendant has failed to show that section 206 has been preempted by any federal law or international instrument.

IV

Defendant contends the trial court violated due process by instructing the jury as to uncharged acts of domestic violence with CALJIC No. 2.50.02 as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in this [*sic*] case. [¶] . . . [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, find [*sic*] the defendant had a disposition to commit other offenses involving domestic violence. [¶] If you find that the defendant had this disposition, you may, but are not required to, infer that he is [*sic*] likely to commit and did commit the crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. The weight and significance, if any, are for you to decide. [¶] You must not consider the [*sic*] evidence for any other purpose."

In a decision filed after defendant's opening brief, this court rejected a due process challenge to CALJIC No. 2.50.02. (*People v. Pescador* (2004) 119 Cal.App.4th 252, 258-262.)

Defendant has not given any persuasive reason why we should reconsider the question.

V

Defendant contends section 206 is unconstitutionally vague, on its face and as applied here. We disagree.

A statute is unconstitutionally vague if it fails to "give [a] person of ordinary intelligence a reasonable opportunity to know what exactly is prohibited." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [33 L.Ed.2d 222, 227].) However, "'[a] statute will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources. [Citation.]'" (*In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1317.)

Defendant appears to assert that section 206 is void for vagueness on its face because "it is impossible for courts to determine whether [torture] is a continuous conduct offense or a single incident requiring unanimity." Defendant is mistaken. As noted in part II of this Discussion, the courts have had no difficulty in determining that torture as defined in section 206 is a continuous course of conduct offense. (*Jenkins, supra*, 29 Cal.App.4th 287, 300.) But even if defendant's premise were factually correct, it would not establish that a person of ordinary intelligence cannot determine what conduct the statute proscribes.

Defendant acknowledges that other courts have rejected vagueness challenges to specific terms used in section 206.

(*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1201-1205; *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1562-1564; see *People v. Raley* (1992) 2 Cal.4th 870, 900-901 [torture-murder special circumstance].) He asserts, however: "[A]lthough courts found the words themselves sufficiently clear, it is the application of those words that have rendered the statute unconstitutionally vague." So far as this statement is intended to support an as-applied vagueness challenge, it fails to do so because defendant does not show how any possible "application" of any term used in the statute was vague as to the facts of this case.

VI

Defendant contends the trial court erred by sentencing him to consecutive terms on counts 8 and 9 (forcible rape, forcible oral copulation) on the ground that they were not committed on a single occasion. We disagree.

Section 667.61, the one strike law, provides in part: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. . . . Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." (§ 667.61, subd. (g).) Defendant does not dispute that section 667.61 applies to his offenses in counts 8 and 9.

The trial court expressly found that the offenses did not occur on a single occasion as the California Supreme Court has defined the term: "The evidence suggests by more than a preponderance of the evidence that there was an interruption

between the act of forcible rape and the act of forcible oral copulation that was advanced by the People in their closing argument and argued first in time, although it didn't take place first in time, around first in time, namely the bathroom incident. The Court's in--I'm finding, basically, that there's nothing in the evidence that suggests that these events were close in time and at the same location, like in *People v. Jones*, which did involve multiple acts of sexual abuse which occurred during an uninterrupted time frame in the back seat of a car. These events took place in different parts of the house at different times, and [t]he Court's imposing consecutive term[s] because they involve two acts of dominance and control, and frankly, humiliation over the victim." Defense counsel objected that count 8 was "too vague in the proof." The trial court reiterated its sentencing decision.

In *People v. Jones* (2001) 25 Cal.4th 98 (*Jones*), the Supreme Court concluded that under section 667.61, subdivision (g), sexual offenses occur on a "single occasion" if committed in "close temporal and spatial proximity"--i.e., "during an uninterrupted time frame and in a single location." (*Jones, supra*, 25 Cal.4th at p. 107.) Based on this definition, the court reversed the consecutive sentences imposed on the defendant, who had committed numerous sexual offenses against a single victim inside a car during a period of about an hour. (*Id.* at pp. 101-102.) However, the court did not fix the outer limits of the terms in its definition, and the parties have not cited any later decision attempting to do so.

Here, by contrast to *Jones, supra*, 25 Cal.4th 98, defendant held the victim prisoner in their house for days, not hours, and during that time they moved among three different rooms (bedroom, bathroom, and work room) while defendant relentlessly assaulted her, but with occasional respites. Counts 8 and 9 were both charged as occurring "[o]n or about June 15, 2002 to June 18, 2002" (unnecessary capitalization omitted). At the preliminary hearing, when the victim was still testifying against defendant, she stated that (1) she had unwilling sex with defendant on both Sunday, June 16, and Monday, June 17; (2) defendant forced her to orally copulate him twice sometime after Sunday, once in the shower and once in the bedroom; and (3) she escaped on Tuesday, June 18, after defendant forced her into the shower and demanded sex. Given this testimony, substantial evidence supports the trial court's finding that counts 8 and 9 did not occur on a single occasion within the meaning of section 667.61.

Arguing to the contrary, defendant asserts only: "Clearly, this was one episode of rage. One continuous episodic beating. And, one continuous sexual assault, involving one act of torture." But the fact that defendant tortured the victim as a result of "one episode of rage" does not tend to prove that defendant's sexual assaults were "continuous" in the sense required to constitute a single occasion under section 667.61.

VII

In a supplemental brief, defendant contends that the use of the victim's out-of-court statements at trial violated *Crawford, supra,* 541 U.S. __ [158 L.Ed. 2d 177]. We disagree.

In *Crawford, supra,* 541 U.S. __ [158 L.Ed. 2d 177], the United States Supreme Court held that the use of out-of-court "testimonial" statements (including, inter alia, prior testimony at a preliminary hearing and police interrogations) against a defendant at trial violates the Confrontation Clause (U.S. Const., 6th Amend.) unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. (*Id.* at p. ___ [158 L.Ed.2d at p. 203].) Here, the prosecution introduced the victim's preliminary hearing testimony and her statements to police officers, as well as other out-of-court statements by her.

Crawford, supra, 541 U.S. __ [158 L.Ed. 2d 177] also made clear, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra,* 541 U.S. at p. ____, fn. 9 [158 L.Ed.2d at pp. 197-198, fn. 9].) In support of this proposition, the court in *Crawford* cited to *California v. Green* (1970) 399 U.S. 149, 162 [26 L.Ed.2d 489, 499], which held there is no Confrontation Clause violation from admitting out-of-court

statements where the declarant is prepared to testify and submit to cross-examination.

Because the victim was present, testified, and submitted to cross-examination, the use of her prior out-of-court statements did not violate the Confrontation Clause. Her testimony at trial gave the jury the opportunity to assess her demeanor as she attempted to deny or explain away the prior statements. The Confrontation Clause requires no more. (*People v. Perez* (2000) 82 Cal.App.4th 760, 766.)

VIII

Defendant also contends in a supplemental brief that the trial court's sentencing violated *Blakely, supra*, 542 U.S. ___ [159 L.Ed.2d 403] in three respects: (1) by imposing consecutive life sentences on counts 8 and 9; (2) by imposing consecutive determinate sentences on counts 2, 12, and 13; and (3) by imposing and staying aggravated consecutive terms under section 654 on the remaining counts. According to defendant, because all these sentencing decisions depended on facts not submitted to the jury and found true beyond a reasonable doubt, we must reverse and remand for resentencing under *Blakely*. For reasons that follows, we shall reject this argument.

Consecutive sentencing

In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (*Cotton*)--a case the Supreme Court decided after its decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), in which the court first held that other than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt (*id.* at p. 490 [147 L.Ed.2d at p. 455])--the court unanimously held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and supported by overwhelming evidence. (*Cotton*, *supra*, 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].)

Such is the case here. The trial court cited the fact that the offenses charged in counts 8 and 9 were not committed on a single occasion as the reason for sentencing them consecutively. As to count 2 (assault with a deadly weapon, to wit, a chain), the trial court stated that the crime involved a separate act of violence and was committed at a different time and place from the rest. As to count 12 (dissuading a witness by force or fear), the trial court cited the fact that this offense had a separate criminal objective from the other acts charged, namely to prevent the reporting of the other offenses. As to count 13 (false imprisonment), the trial court cited the fact of defendant's prior domestic violence incident involving K. M., which also involved false imprisonment, as a factor in aggravation.

Defendant did not raise an *Apprendi* objection to any of these sentencing choices at the time of sentencing, and the facts used in imposing the consecutive sentences were

uncontested at trial and supported by overwhelming evidence. As to counts 8 and 9, the victim's prior statements demonstrated that the offenses were not committed on a single occasion, as explained above in part V of the DISCUSSION; defendant did not testify; and in trying to repudiate her prior story, the victim did not give any evidence from which the jury could have concluded that two offenses occurred but on a single occasion. Likewise, the evidence the trial court cited in support of consecutive sentencing on the remaining counts was overwhelming and undisputed. Consequently, defendant has forfeited his right to raise *Apprendi, supra,* 530 U.S. 466/*Blakely, supra,* 542 U.S. __ [159 L.Ed.2d 403]. (*Cotton, supra*, 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].)

In any event, defendant's claim of error based on the imposition of consecutive sentences fails on the merits because the rule of *Apprendi, supra,* 530 U.S. 466 and *Blakely, supra,* 542 U.S. __ [159 L.Ed.2d 403] does not apply to our state's consecutive sentencing scheme.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather

than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra,* 17 Cal.3d 75, 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but not to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate

review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated does not create a presumption of entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by *Blakely, supra,* 542 U.S. __ [159 L.Ed.2d 403]. In this state, all persons who commit multiple crimes know they risk consecutive sentencing. While they have the right to the exercise of a trial court's discretion, they do not have a legal right to concurrent sentencing, as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Id.* at p. ___ [159 L.Ed.2d at p. 417].)

Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

Section 654 counts

Assuming without deciding that *Blakely, supra,* 542 U.S. __ [159 L.Ed.2d 403] applies to sentences imposed but stayed under section 654, we conclude that defendant has likewise forfeited his claim of *Blakely* error as to the sentences so imposed and stayed (counts 3-7, including the enhancement on count 7, and count 11) because he did not raise an *Apprendi* objection at the

time of sentencing. (*United States v. Cotton, supra,* 535 U.S. 625, 631 [152 L.Ed.2d 860, 868].)

DISPOSITION

The judgment is affirmed.

SIMS, J.

I concur in the judgment and in the opinion except as to Part VIII of the Discussion, as to which I concur in the result.

I disagree with the discussion of the application of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] and *Blakely* v. Washington (2004) _____ U. S. _____ [159 L.Ed.2d 403] to consecutive sentencing (Part VIII) for two reasons.

First, *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860], is not a forfeiture case. Rather, it states the grounds upon which an *Apprendi* error, as to which no objection has been interposed, may be reached under rule 52(b) of the Federal Rules of Criminal Procedure (18 U.S.C.), namely when the error is plain, affects the substantial rights of the party and affects the fairness, integrity or public reputation of the judicial proceedings. (*Id.* at pp. 631-632 [at p. 868].) This a harmless error test. A failure to raise *Apprendi* does not forfeit the claim of error when inter alia it is harmful.

Second, *Apprendi* and *Blakely* apply when the maximum sentence a court may impose requires the ascertainment of facts not contained in the jury's verdict or admitted by the defendant. That may be the case where a consecutive sentence is based on such facts. (See Cal. Rules of Court, former rule 4.425.) Such facts include that the crimes involve separate acts of violence. (Former rule 4.425(a)(2). That is the case here.

However, since the facts of separate acts of violence were separately charged (counts 8 and 9) and uncontested at trial and so found by the jury, neither *Apprendi* or *Blakely* apply.

BLEASE, Acting P. J.

RAYE, J.

I concur in the opinion except as to part VIII, as to which I concur in the result.

I do not agree that defendant has forfeited his right to raise issues arising under *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*) by failing to object at the time of sentencing. In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court set forth the principles that control whether failure to object to sentencing errors before or during a sentencing hearing is fatal to a later appellate claim. *Scott* rests on the pragmatic premise that appellate courts should be relieved of the burden of reviewing sentencing errors that could have been easily remedied had the defendant brought them to the attention of the trial court. Because defendant in this case was sentenced before *Blakely* was decided, judicial resources would not have been conserved by the assertion of a right to a jury trial on the factual issues underpinning the sentence choices, a right then unbeknownst to defendant, his lawyer, or the trial judge. Like waiver, forfeiture requires knowledge of a right. We impose an obligation upon one who knows of the existence of a right to assert the right at an appropriate juncture in the legal process. In the traditional vernacular of the waiver doctrine, defendant could not have "knowingly and intelligently" waived a right yet to be articulated by the United States Supreme Court.

Nonetheless, I agree that the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely* does not apply, in this instance, to the court's decision to impose consecutive sentences. I am also of the view that an *Apprendi*/*Blakely* analysis has no application to whether punishment should be stayed under Penal Code section 654. (Cf. *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270.)

RAYE, J.

APPENDIX

Counts 1 through 9 and 11 through 13

of the Amended Information

"The said defendant(s) is/are accused by the District Attorney of the County of SAN JOAQUIN of the State of California, by this information, of the following crime(s):

"PC 206 TORTURE

COUNT: 001, On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of TORTURE, in violation of Section 206 of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid did willfully and unlawfully and with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion and for a sadistic purpose, inflict great bodily injury, as defined in Penal Code section 12022.7 upon JANE DOE.

"PC 245(A)(1) ADW/ASSLT W/FRC LIKELY GBI

COUNT: 002, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 001, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon

JANE DOE, with a deadly weapon, to wit, CHAIN, or by means of force likely to produce great bodily injury.

"PC 245(A)(1) ADW/ASSLT W/FRC LIKELY GBI

COUNT: 003, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 002, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon JANE DOE, with a deadly weapon, to wit, FLASHLIGHT, or by means of force likely to produce great bodily injury.

"PC 245(A)(1) ADW/ASSLT W/FRC LIKELY GBI

COUNT: 004, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 003, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon

JANE DOE, with a deadly weapon, to wit, CROWBAR, or by means of force likely to produce great bodily injury.

"PC 245(A)(1) ADW/ASSLT W/FRC LIKELY GBI

COUNT: 005, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 004, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon JANE DOE, with a deadly weapon, to wit, TIRE IRON, or by means of force likely to produce great bodily injury.

"PC 245(A)(1) ADW/ASSLT W/FRC LIKELY GBI

COUNT: 006, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 005, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY OR WITH DEADLY WEAPON AND INSTRUMENT in violation of Section 245(a)(1) of the Penal Code, a FELONY was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully commit an assault upon

JANE DOE, with a deadly weapon, to wit, FIRE, or by means of force likely to produce great bodily injury.

"PC 273.5(A) INFLICT CORPORAL INJURY TO SPOUSE/COHABITANT/[]
COUNT: 007, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 006, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of CORPORAL INJURY TO SPOUSE/COHABITANT/PARENT OF CHILD, in violation of Section 273.5(A), A FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully inflict a corporal injury resulting in a traumatic condition upon JANE DOE, who was then and there the spouse/cohabitant or parent of child of the defendant.

"PC 12022.7(E) INFLICTION OF GREAT BODILY INJURY
It is further alleged that in the commission of the above offense the said defendant KENNETH LEE MARTINEZ, personally inflicted great bodily injury under circumstances involving domestic violence upon JANE DOE, within the meaning of Penal Code Section 12022.7(e) and also causing the above offense to be a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

"PC 261(A)(2) RAPE: FORCE/FEAR/ETC

COUNT: 008, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 007, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of FORCIBLE RAPE, in violation of Section 261(a)(2) of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully have and accomplish an act of sexual intercourse with a person, to wit: JANE DOE, not his/her spouse, against said person's will, by means of force, violence, duress, menace and [*sic*] fear of immediate and unlawfully [*sic*] bodily injury on said person and [*sic*] another. It is further alleged that the above offense is a serious felony within the meaning of Penal Code section 1192.7(c)(3).

"PC 12022.7(E) INFLICTION OF GREAT BODILY INJURY

It is further alleged that in the commission of the above offense the said defendant KENNETH LEE MARTINEZ, personally inflicted great bodily injury under circumstances involving domestic violence upon JANE DOE, within the meaning of Penal Code Section 12022.7(e) and also causing the above offense to be a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

"PC 667.61(A)(D)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(a)(d)(3), as to KENNETH LEE MARTINEZ, that in the commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the defendant inflicted torture on the victim, to wit: JANE DOE, as defined in Penal Code Section 206.

"PC 667.61(B)(E)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(b)(e)(3), as to KENNETH LEE MARTINEZ, that in the commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the Defendant personally inflicted great bodily injury on the victim to wit: JANE DOE or another person in the commission of the present offense in violation of Section 12022.7, or 12022.8.

"PC 667.61(B)(E)(4) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(b)(e)(4), as to KENNETH LEE MARTINEZ, that in the commission of the crime of FORCIBLE RAPE as defined in PENAL CODE SECTION 261(A)(2), the Defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3.

"PC 667.61(A)(E)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(a)(E)(3)(4), as to KENNETH LEE MARTINEZ, that in the commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the Defendant personally inflicted great bodily injury on the victim [] to wit: JANE DOE or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8; and the Defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3.

"PC 288A(C) FORCIBLE ORAL COPULATION

COUNT: 009, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 008, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of FORCIBLE ORAL COPULATION, in violation of Section 288a(c) of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully participate in an act of oral copulation with JANE DOE, and did accomplish said act against said victim's will by force, violence, duress, menace, and fear of immediate and unlawful bodily injury to said victim and to another. NOTICE: The above offense is a serious FELONY within the meaning of Penal Code Section 1192.7(c)(5). NOTICE:

Conviction of this offense will require the court to order you to submit to a blood test for evidence of antibodies to the probable causative agent of Acquired Immune Deficiency (AIDS). Penal Code Section 1202.1. NOTICE: Conviction of this offense will require you to register pursuant to Penal Code Section 290. Willful failure to register is a crime.

"PC 12022.7(E) INFLICTION OF GREAT BODILY INJURY

It is further alleged that in the commission of the above offense the said defendant KENNETH LEE MARTINEZ, personally inflicted great bodily injury under circumstances involving domestic violence upon JANE DOE, within the meaning of Penal Code Section 12022.7(e) and also causing the above offense to be a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

"PC 667.61(A)(D)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(a)(d)(3), as to KENNETH LEE MARTINEZ, [] that in the commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the defendant inflicted torture on the victim, to wit: JANE DOE, as defined in Penal Code Section 206.

"PC 667.61(B)(E)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(b)(e)(3), as to KENNETH LEE MARTINEZ, [] that in the

commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the Defendant personally inflicted great bodily injury on the victim to wit: JANE DOE or another person in the commission of the present offense in violation of Section 12022.7, or 12022.8.

"PC 667.61(B)(E)(4) SPECIAL ALLEGATIONS SEX CRIMES

[I]t is further alleged, within the meaning of Penal Code Section 667.61(b)(e)(4), as to KENNETH LEE MARTINEZ, [] that in the commission of the crime of FORCIBLE ORAL COPULATION as defined in PENAL CODE SECTION 288A(C), the Defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3.

"PC 667.61(A)(E)(3) SPECIAL ALLEGATIONS SEX CRIMES

It is further alleged, within the meaning of Penal Code Section 667.61(a)(E)(3)(4), as to KENNETH LEE MARTINEZ, that in the commission of the crime of Forcible Rape as defined in Penal Code Section 261(a)(2), the Defendant personally inflicted great bodily injury on the victim[,] to wit: JANE DOE or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8; and the Defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3.

"[Defendant was acquitted on count 10.]

"PC 422 CRIMINAL THREATS

COUNT: 011, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 010, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of CRIMINAL THREATS, in violation of Section 422 of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully threaten to commit a crime which would result in death or great bodily injury to another, to-wit: JANE DOE, with the specific intent that the statement be taken as a threat. It is further alleged that the threatened crime, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to said victim a gravity of purpose and an immediate prospect of execution. It is further alleged that the said victim was reasonably in sustained fear of his or her safety and the safety of his or her immediate family.

"PC 136.1(C)(1) DISSUADING A WITNESS BY FORCE OR THREAT

COUNT: 012, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 011, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of DISSUADING A WITNESS BY FORCE OR THREAT, in violation of Section 136.1(c)(1) of the Penal Code, a FELONY,

was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully, knowingly, maliciously, and unlawfully prevent and dissuade JANE DOE, and attempt to prevent and dissuade said victim, a victim and witness of a crime, by means of force and threats of unlawful injury to the person and damage to the property of himself/herself and another from: MAKING A REPORT OF SUCH VICTIMIZATION TO A PEACE OFFICER, STATE AND LOCAL LAW ENFORCEMENT OFFICER, PROBATION, PAROLE, AND CORRECTIONAL OFFICER, PROSECUTING AGENCY, AND JUDGE.

"PC 236 FALSE IMPRISONMENT BY VIOLENCE

COUNT: 013, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 012, complainant further complains and says: On or about JUNE 15, 2002 TO JUNE 18, 2002 the crime of FALSE IMPRISONMENT BY VIOLENCE, in violation of Section 236 of the Penal Code, a FELONY, was committed by KENNETH LEE MARTINEZ, who at the time and place last aforesaid, did willfully and unlawfully violate the personal liberty of JANE DOE, said violation being effected by violence, menace, fraud, and deceit."